90-977

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

RPM MANAGEMENT COMPANY, INC. and
RECTOR-PHILLIPS-MORSE, INC. ..... *Petitioners*

VS.

ROBERT CHOWNING; JUDITH D. BURROW, Executrix of the Estate of Lawrence B. Burrow, Deceased; WILBUR P. GULLEY, JR.; MARY E. GULLEY; JANET GULLEY WADE; HERSCHEL H. FRIDAY; and HAWTHORNE LAND COMPANY ..... *Respondents*

Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Arkansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Given that the State Appellate Court's decision was unpublished and, therefore, by virtue of state law, cannot be of future precedential value, did the Court's refusal to follow established Arkansas precedent and principles of contract law only in Petitioners' case amount to an arbitrary denial of equal protection and due process of law?

PARTIES TO THIS PROCEEDING

Petitioners:

Rector-Phillips-Morse, Inc.
RPM Management Company, Inc.

Respondents:

Robert Chowning
Judith D. Burrow, Executrix of the Estate of Lawrence B. Burrow, Deceased
Wilbur P. Gulley, Jr.
Mary E. Gulley
Janet Gulley Wade
Herschel H. Friday
Hawthorne Land Company

Parent Companies or Subsidiaries of Petitioners

Rector-Phillips-Morse, Inc.
Phillips-Morse Construction Co., Inc.
RPM Mortgage Co., Inc.
RPM Land Sales, Inc.
Birch-Brook, Inc.
RPM Management Company, Inc.

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IN THE
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October Term, 1990

RPM MANAGEMENT COMPANY, INC. and
RECTOR-PHILLIPS-MORSE, INC. ..... *Petitioners*

VS.

ROBERT CHOWNING; JUDITH D. BURROW, Executrix of the Estate of Lawrence B. Burrow, Deceased; WILBUR P. GULLEY, JR.; MARY E. GULLEY; JANET GULLEY WADE; HERSCHEL H. FRIDAY; and HAWTHORNE LAND COMPANY ..... *Respondents*

Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Arkansas

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

RPM Management Company, Inc. and Rector-Phillips-Morse, Inc., the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Arkansas Court of Appeals entered in the above case on June 27, 1990.

OPINIONS BELOW

RPM Management Company, Inc. et al. v. Chowning, et al., No. CA-89-168 (Ark. Ct. App. June 27, 1990). The Opinion was marked "Not for Publication" and not reported.

JURISDICTION

The Judgment of the Court of Appeals of the State of Arkansas was entered on June 27, 1990. A timely Petition for Rehearing was denied by the Arkansas Court of Appeals on August 22, 1990 and the Supreme Court of the State of Arkansas denied a timely Petition for Review on September 10, 1990. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C.A. §1257.

LAW INVOLVED

Constitution of the United States, Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Supreme Court Rule 21.3 and 21.4:

3. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked, Not Designated for Publication.

4. Opinions of the Court of Appeals not designated for publication shall not be published in the official reports and

shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as *res judicata*, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the Arkansas Report by case number, style, date, and disposition.

Ark. Code Ann. §4-42-309 (1987):

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

Ark. Code Ann. §4-42-304 (1987):

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner, or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

STATEMENT OF THE CASE

On January 6, 1972, Rector-Phillips-Morse, Inc. ("RPM") became the sole owner of real property located in Pulaski County, Arkansas, now commonly known as "Southwest City Mall" (the "Property"). On January 11, 1972, RPM, as sole owner of the Property, entered into a written management agreement with Anything, Inc. under the terms of which Anything, Inc. had the exclusive right and duty to rent, lease, operate and manage the Property for 25 years until January 5, 1997 (the "Management Agreement"). The Management Agreement specifically stated that it was "binding upon the successors and assigns" of the parties. RPM Management Company, Inc. (the "Management Co.") is the successor of Anything, Inc. and at all times pertinent hereto, Anything, Inc. and the Management Co. were wholly owned subsidiaries of RPM.

All Respondents are successors in interest of RPM, the original owner. The transfers of RPM's interest to Respondents involved a complicated series of real estate transactions. In summary, they began on September 26, 1972, when RPM, and two prominent attorneys, Robert Chowning ("Chowning") and Larry Burrow ("Burrow") formed a joint venture known as "Southwest City Joint Venture" (the "Joint Venture") to own and operate a shopping center on the Property. Chowning was vice president and legal counsel for RPM during the time in question.

For tax reasons it was decided that Hawthorne Land Company ("Hawthorne"), one of the state's oldest property businesses, and Herschel Friday ("Friday"), the state's most prominent lawyer, should not own an interest in the Joint Venture partnership but instead should own an interest in the real estate. A 20% interest in the Property (not the Joint Venture) was conveyed to Friday on July 27, 1973, and a 10% interest in the Property was conveyed to Hawthorne on September 1, 1973. Likewise, Eleanor T. Rector, now

Eleanor Trotter, obtained a 5% interest in the Property. Mrs. Trotter is the widow of Billy Rector, the former president of RPM, who represented RPM in initially forming the Joint Venture with Chowning and Burrow.

On the date the Management Agreement was terminated, there were four owners of the Property, namely the Joint Venture, Friday, Hawthorne and Trotter. All other Respondents (including Wilbur P. Gulley, Jr., then president of one of the State's largest and most prominent financial institutions) had acquired an interest in the Joint Venture, not the Property.

On October 4, 1973, Chowning, having knowledge of the Management Agreement, requested Hawthorne and Friday to acknowledge the Management Agreement which they did in writing later that month.

No member of the Joint Venture signed any document acknowledging the Management Agreement, but from January 11, 1972 until December 31, 1986, the Management Co. operated and managed the Property for 15 years as required by the Management Agreement. Respondents received a monthly check and management report from the Management Co. Respondents occasionally attended owner's meetings in the offices of the Management Co., and the Management Co. personnel were in attendance at all such meetings. Each year the Management Co. delivered to Respondents an income tax K-1 form for their interest in the Joint Venture.

On September 10, 1986, Respondents sold the Property for $5,265,000 and terminated management of the Property by the Management Co. effective December 31, 1986. To establish a fund to satisfy the Management Co.'s claims for breach of the Management Agreement (which were the basis of this litigation), Respondents delivered a $400,000 letter of credit to First Commercial Bank, N.A. to be held in escrow. In Orders filed on December 20, 1988 and on

December 22, 1988, the Chancellor found some, but not all, of the Respondents liable under the Management Agreement and computed the Management Co.'s damages at $41,651.31 for the breach of the Management Agreement.

On appeal Petitioners argued *inter alia* that there was error in admitting Respondent's testimony regarding what the deceased, Billy Rector, did not say.

Respondent's argued on cross-appeal that none of the Respondents should have been held liable.

The Court of Appeals did not address most of the Arkansas law issues on appeal, and ignored Arkansas precedent and ruled that the trial judge was correct in admitting Respondent's testimony regarding the silence of the deceased, Billy Rector. Furthermore, the Court of Appeals again ignored Arkansas case law and reversed the trial court and held that Chowning, Friday and Hawthorne were not liable.

Petitioners' requested a rehearing from the Court of Appeals alleging *inter alia* that the Court erred:

(1) in determining that the Management Agreement was silent with respect to its termination upon sale;

(2) in adopting an irrebuttable "mum" dead man rule for Billy Rector, and ignoring the parol evidence rule;

(3) in failing to even consider Ark. Code Ann. §4-42-304, which imputes knowledge of one partner to the partnership; and

(4) in denying Petitioners' equal protection and due process as a result of all of the above.

The Court of Appeals rejected the Petition for Rehearing on August 22, 1990.

A timely Petition for Review was filed with the Supreme Court of Arkansas but was denied on September 10, 1990.

REASONS FOR GRANTING A WRIT

By marking the opinion below "Not for Publication", the Arkansas courts created an exception to Arkansas' contract law that applies only to Petitioners. Specifically, the opinion below states that notwithstanding the fact that persons have actual knowledge of the duration of the Agreement they are not bound thereby because "[a]lthough the agreement specifies a twenty-five-year term, the agreement is silent as to its effect upon the sale of the property." Opinion, p. 6. The Agreement specified that it was binding upon the successors and assigns of the original parties thereto. Furthermore, the opinion below creates an irrebuttable presumption applicable only to Petitioners that any testimony that a dead man made no statement is conclusively presumed correct (the "irrebuttable mum dead man rule"). The opinion below overturns 200 years of precedent that the express duration of a contract may not be ignored in light of subsequent change in circumstances, and establishes the "irrebuttable mum dead man rule," but these rulings were made applicable only to Petitioners by virtue of the Court's determination that the opinion below should be an unreported decision. Arkansas Supreme Court Rule 21.4 provides that an unpublished opinion shall not be used as precedent in future decisions, therefore the Court's reversal of centuries of precedent and adoption of new presumptions applies only to the Petitioners, and unfairly discriminates against Petitioners in violation of their equal protection and due process rights.

This Court should grant this Petition because it has not yet defined at what point irregularities in state civil judicial proceedings become subject to Fourteenth Amendment scrutiny. Petitioners raised the Fourteenth Amendment due process and equal protection arguments in their Petition to the Court of Appeals for rehearing, immediately after the deprivation of their constitutional rights occurred, but the Petition was denied without comment on August 22, 1990. The Fourteenth Amendment argument was also

contained in the Petition for Review to the Arkansas Supreme Court. Petitioners submit that circumstances surrounding the unpublished Arkansas Court of Appeals' decision and denial of rehearing, and the Arkansas Supreme Court's denial of Petition for Review, are sufficient to lead this Court to conclude that Petitioners' Fourteenth Amendment rights have been violated by the Arkansas courts.

Petitioners' rights to due process and equal protection under the Fourteenth Amendment have been violated by the Court's refusal to follow Arkansas law regarding parol evidence and interpretation of contract language. Ordinarily it could be argued that failure to follow case law precedent and statutes simply indicates that the Court is reversing itself, but in this case the Court's decision was marked "Not for Publication" and, therefore, under Arkansas Supreme Court Rule 21, may not be cited in future cases. Because it may not even be cited, this decision is not a reversal of Arkansas law, even though it, in effect, overturned rules of law established by the Supreme Court of Arkansas for this case. The Court of Appeals arbitrarily refused to apply Arkansas law to this one case. Because the decision in Petitioners' case cannot be used as precedent, the law will be applied in the future as it was in the past—but not to protect Petitioners. Petitioners are simply being denied equal protection of the law.

Procedural guarantees of due process apply whenever the State seeks to remove or significantly alter interests within the meaning of either liberty or property. *Paul v. Davis*, 424 U.S. 693 (1976), *rehearing denied*, 425 U.S. 985 (1976). This Court has held many times that judicial action is state action. Perhaps the most notable instance was *Shelley v. Kraemer*, 334 U.S. 1 (1948). Although the facts were somewhat different, *Shelley* recognized the fundamental truth that the power of the state extends to its judicial arm and a deprivation of rights by that arm is no more valid than

if it were done through the legislative or executive branches.

In the present case, Petitioners' rights to due process were violated when the Arkansas Court of Appeals ignored Arkansas Statutes and established case law in making its decision to prevent enforcement of the Management Agreement.

It has also been recognized that state common law "is 'law' within the meaning of the Equal Protection clause" and is subject to "the same rational basis standard applicable to legislative enactments.." *In re Asbestos Litigation*, 829 F.2d 1233 (3rd Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

Historically, it is quite clear that arbitrary enforcement of state laws by executive or administrative agencies is in violation of the Fourteenth Amendment's Equal Protection and/or Due Process clauses. *Shock v. Tester*, 405 F.2d 852 (8th Cir. 1969), *cert. denied*, 394 U.S. 1020 (1969), *rehearing denied*, 395 U.S. 941 (1969); *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). Petitioners' urge that this court extend this protection to prevent the arbitrary application (or nonapplication) of state law by state courts as well by adopting the holding in *In re Asbestos*. If one is denied equal protection of the law, it should make no difference whether the deprivation is the result of either executive or judicial action. A deprivation of rights is a deprivation of rights, regardless of the source.

The Court of Appeals ignored Arkansas law and the English language regarding the effect of (1) the Management Agreement's expressly stated term of duration of 25 years and (2) the Management Agreement language "binding upon successors and assigns."

In finding the Management Agreement to be indefinite as to duration and therefore unenforceable despite the express term of 25 years, the Court of Appeals violated several generally accepted rules of interpretation and one of its own rulings as to the effect of a term of duration. If there are words that fix an ascertainable fact or event, by which the term of the Contract's duration can be determined, the contract is definite and certain in that particular. *Sutton v. Sutton*, 28 Ark. App. 165, 771 S.W.2d 791 (1989) citing 17 Am.Jur.2d, Contracts §80 (2d ed. 1964). Contractual language should be interpreted "in accordance with its generally prevailing meaning." Restatement, Second, Contracts §201 Comment A. The Management Agreement plainly stated that it was to be in force for 25 years. One need not even look to anything else by which to measure its duration. The Management Agreement was definite as to duration. To say otherwise was not merely an error, but an effort on the part of the Court of Appeals to avoid enforcement of Arkansas law. Further support for the effect of a specific term of duration can be found in 17A C.J.S., Contracts §385(1) which says, "[W]here an agreement expressly stipulates that it is to continue for a particular time . . . it remains in force and terminates in accordance with its terms, and does not terminate sooner."

Even assuming, for the sake of argument, that an interpretation of "25 years" as indefinite is possible,

> In construing a contract, if there are two constructions, each of which is reasonable, one of which will make the contract enforceable, and the other which will make it unenforceable, the court will prefer the construction which will make it enforceable.

Sutton, 28 Ark. App. 165, 771 S.W.2d at 792 citing *Hastings Indust. Co. v. Copeland*, 114 Ark. 415, 169 S.W. 1185 (1914).

The Court of Appeals reasoning, if not limited just to Petitioners, would invalidate every contract made in the

State of Arkansas which specifically expresses a length of term, but does not contain all conditions upon which it would be terminated, and every condition upon which it would *not* be terminated. If this rule were applied to everyone it would effectively prohibit any ability to freely contract because no contract could be enforceable. That this reasoning is applied only to Petitioners may not be as harmful to society, but it still denies Petitioners equal protection of the law.

The Court also simply said that the Management Agreement was silent on what would happen in the event of a sale. What meaning the Court attached to the word "assigns" is unknown. Yet, assigns are those who purchase at a sale. An assignment is a transfer of title, *Ouachita Industries v. Anderson*, 236 Ark. 929, 370 S.W.2d 811 (1963). "Assigns" means: "those to whom property is, will, or may be assigned . . . it generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law." Black's Law Dictionary (5th Ed. 1979). *See also Ferrell v. Deverick*, 85 W.Va. 1, 100 S.E. 850 (1919); *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936); *Olson v. Jantausch*, 44 N.J. Super. 380, 130 A.2d 650 (1957).

In Arkansas once the terms of the contract are reduced to writing, parol evidence of prior or contemporaneous statements is inadmissible to vary or add to the terms of the contract. *Crawford v. General Contract Corp.*, 174 F.Supp. 283 (W.D. Ark. 1959); *Crossett v. Riles*, 261 Ark. 522, 549 S.W.2d 800 (1977); *Anderson v. Wainwright*, 67 Ark. 62, 53 S.W. 566 (1899); *Coulson Oil Co. v. Wilcox*, 12 Ark. App. 111, 671 S.W.2d 198 (1984).

The terms of the Management Agreement were reduced to writing at the time the Joint Venture was created and Ark. Code Ann. §4-42-309 (1987) made all Respondents "liable for the obligations of the partnership." Chowning, a member of the Joint Venture and legal counsel at the time

for Petitioner, RPM, admitted knowing of the Management Agreement "not later" than October 1975. Friday and Hawthorne also ratified the agreement at about this time. Ark. Code Ann. §4-42-304 (1987) states that notice to one partner in a joint venture is notice to all partners. Unquestionably, by the overwhelming weight of the evidence, one member of the Joint Venture, Robert Chowning, knew about the Management Agreement and therefore by operation of law, all members of the Joint Venture had knowledge of its "existence" contrary to the opinion below. The opinion failed and refused to address this issue. Since the statute is so clear that no decision has been rendered in the past forty years interpreting it, the opinion below excludes Petitioners from the protection and benefits of Section 4-42-304, by marking the opinion "Not for Publication." This was a case of arbitrary unenforcement of state law by an arm of the state—something this Court has often found to be unacceptable.

Against the weight of Arkansas law, the opinion below relied upon parol evidence that not only directly contradicted the meaning of the words of the contract, *i.e.*, 25 years, but created a pesumption that a dead man's silence is not rebuttable. This "evidence" was used to find some, and then all, of the respondents not liable in the courts below. Any attempt to show by oral testimony that the unambiguous Agreement terms were any different is a patent violation of the parol evidence rule, putting aside the fact that witnesses could testify without any fear that Billy Rector could arise from his grave to contradict them. The parol evidence rule, is a rule of substantive law in Arkansas, and not only prohibits contradiction or variance of the terms of a written contract, it also prohibits *additions* to it. *Crossett v. Riles*, 261 Ark. 522, 549 S.W.2d 800 (1977). The testimony about statements attributed to Billy Rector were offered to flatly contradict the 25 year term of the written Agreement and would have, to say the very least, added a provision to the Agreement. The offending testimony was that Rector never told Respondents what would happen to

the Management Agreement upon sale of the property. However, the written Management Agreement was *not* silent on the effect of a sale of the property. It explicitly provided for binding buyer-assignees in clear and unambiguous language for 25 years. The effect of the opinion below is to permit parol evidence to alter the express 25 year duration of the contract, because the shorter duration of the contract was sanctioned by the opinion.

The opinion's conclusion is that a dead man's silence is undisputable. As a practical matter, once any trial judge admits testimony of a dead man's *omission*, it cannot be disputed. Dead men don't talk. Therefore once the evidence of a dead man's silence is admitted, the weight of the evidence shifts in favor of the party testifying that the dead man failed to make a statement. And once the weight of the evidence shifts, there is absolutely no way to shift it back. There is no way to rebut. This "irrebuttable mum dead man rule" is without precedent, and the opinion cites none. The "irrebuttable mum dead man rule," if applied to everyone, would affect virtually thousands of Arkansas contracts, and open the door to collusion, avarice and greed and permit parties to totally ignore their written obligations. The rule, however, applies only to Petitioners because the opinion below is marked "Not for Publication."

By failing to strike testimony regarding what the deceased, Billy Rector, had said, and then relying upon that testimony as the basis of their decisions, the opinion below created a presumption that denied Petitioners the opportunity to rebut. In *Carter v. Morehouse Parish School Board*, 441 F.2d 380 (5th Cir. 1971), *cert. denied*, 404 U.S. 880 (1971), this Court let stand a ruling that a decision based on evidence which a party was not allowed to confront or rebut was a denial of due process.

Petitioners' rights to due process were also violated when the court, as an instrument of the State, simply

eliminated Petitioners' interest in a binding and valid contract. It is a general rule that persons are free to contract and their agreements shall be held valid and enforceable in the courts as long as the agreements are voluntarily and fairly made. *Twin City Pipeline Co. v. Harding Glass Co.*, 283 U.S. 353 (1931). This Court has held that the right to contract in the course of business is part of the liberty interest protected by the Fourteenth Amendment. *Lochner v. New York*, 198 U.S. 45 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *see also, Churchwell v. United States*, 414 F.Supp. 499 (D.S.D. 1976) *aff'd.* 545 F.2d 59 (1976) and *Pyeatte v. Board of Regents of the University of Oklahoma*, 102 F.Supp. 407 (W.D. Okla. 1952) *aff'd.* 342 U.S. 936 (1952).

The opinion below deprived Petitioners of vested property rights protected by the Fourteenth Amendment, when it voided a contract which had been in force for 15 years. This eliminated rights and duties which had been established by the Management Agreement and the actions of the parties over a long period of time. It cannot be truthfully said to be a mere adjudication of what those rights were—not 15 years after the fact. These rights were sufficiently established to fall under Fourteenth Amendment protection as property. All of the parties knew and had determined what those rights were, and were in agreement until Respondents were presented with an opportunity to reap a $500,000 windfall by reneging on their contractual obligations.

This Court has held that a determination of whether there has been a denial of equal protection depends upon the facts surrounding a particular case. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). *See also, Perry v. Grenada Municipal Separate School District*, 300 F.Supp. 748 (N.D. Miss, 1969).

Due process is basic fairness or justice measured by community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct. *Breithaupt v. Abram*, 352 U.S. 432 (1957). Petitioners submit that the facts surrounding the decision of the Arkansas Court of Appeals and Supreme Court denial of review represent a denial of Petitioners' rights to due process and equal protection.

The Arkansas Court of Appeals threw out Arkansas law only as it relates to this case and affected only the financial interests of the individuals involved. The degree to which the Court deviated from Arkansas Law, and the Court's disregard of admitted facts, strongly suggest that the opinion of the Court of Appeals below is based upon something other than Arkansas law. This Court should find such an occurrence shocking to its conscience.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinion of the Arkansas Court of Appeals of June 27, 1990

RPM Management Company, Inc., *et al.*, Appellants
v.
Robert CHOWNING, *et al.*, Appellees
No. CA 89-168

GEORGE K. CRACRAFT, Associate Judge

This matter is before us on appeal and cross-appeal from an order entered in Pulaski County Chancery Court. A detailed analysis of the six-volume transcript could serve to only unduly lengthen this opinion. Therefore, we make general references to pleadings and recite only that testimony deemed necessary for an understanding of our opinion.

In 1972, Rector-Phillips-Morse, Inc., (hereinafter referred to as RPM), the sole owner of Southwest City Mall, entered into a management agreement with its wholly owned subsidiary Anything, Inc., the predecessor in interest to appellant RPM Management Company, Inc. (hereinafter referred to as Management), under which Anything, Inc. (and its successor) was employed to manage the mall property for a period of twenty-five years. The agreement provided that the terms of the contract be binding upon the successors and assigns of the agent and the owner, but contained no provision with respect to its continuation or termination should the owners dispose of the property prior to the termination date of the agreement.

Shortly after RPM executed the management agreement, it sold portions of its interest in the mall property to appellees Robert Chowning and Larry Burrow (now deceased). Chowning, Burrow, and RPM then entered

into a joint venture agreement known as "Southwest City Joint Venture" (hereinafter referred to as Joint Venture). Interests in the Joint Venture were subsequently transferred to the Eleanor Rector Trust and appellees Wilbur Gulley, Mary Gulley, and Janet Gulley Wade. Additional interests in the mall property were sold by RPM to appellees Herschel Friday and Hawthorne Land Company, neither of whom became members of the Joint Venture. The Rector family subsequently acquired RPM's remaining interests through a settlement agreement that was entered into after the death of Billy Rector, the president and chief executive officer of RPM.

In 1984, appellees and RPM offered the mall property for sale. After the property was listed, appellees were advised for the first time by Management that it claimed a contractual right to continue the management agreement after the property was sold. Several prospective purchasers lost interest when informed of Management's claim. The parties subsequently entered into an escrow agreement under which the mall property was sold free of the management contract and appellees then brought this declaratory judgment action for a determination of their obligations under the contract, for an accounting, and for all other relief to which they might be entitled. Appellants, RPM and Management, answered and counterclaimed, seeking damages from appellees for breach of the management contract.

The chancellor found that the members of the Joint Venture had never accepted an assignment of the agreement and were not liable to appellants under its terms. She dismissed appellants' counterclaim as to the Eleanor Rector Trust, the Rector family, and appellees Wilbur Gulley, Mary Gulley, and Janet Gulley Wade. She found, however, that appellees Robert Chowning, Herschel Friday, and Hawthorne Land Company had ratified the management agreement and were liable for its breach, but in an amount less than that which would have been due had the contract been fully performed.

On appeal, appellants contend that the chancellor erred in finding that the agreement was not an obligation of the Joint Venture, in finding that a settlement agreement had released the Rector family from liability under the agreement, and in admitting parol statements made by Billy Rector, now deceased. We find no error and affirm the chancellor's order on these points. Appellants also contend that the chancellor erred in reducing the amount of damages owed by appellees Chowning, Friday, and Hawthorne Land Company. Because we take the view that those appellees are not liable, we do not address that issue.

On cross-appeal, appellees contend that the chancellor's finding that Chowning, Friday, and Hawthorne Land Company had ratified and agreed to be bound by the management contract is against a preponderance of the evidence. We agree and reverse on that point. Appellees also contend that they were entitled to a return of the broker's commission paid to RPM for breach of its fiduciary duty. We disagree and affirm on that point.

We first address appellants' contention that the chancellor erred in not finding that the management agreement was an obligation of the Joint Venture. They argue that, because appellees are members of the Joint Venture along with RPM, the management agreement became an obligation of the Joint Venture under Ark. Code Ann. §4-42-309 (1987), which provides that a new partner admitted into an existing partnership is liable for all obligations of the partnership that arose before its admission. We do not agree. That code section would be applicable only if the management agreement was an obligation of the Joint Venture at the time those appellees became members of the Joint Venture. Here, the management agreement was entered into between RPM and Management prior to the time that the Joint Venture was formed. The Joint Venture was not a party to that contract.

Simply because the management agreement provides that it is binding on the successors and assigns of the owners does not mean that appellees automatically became liable under the agreement without consenting to be bound by its terms. An assignment is essentially a delegation of duties by an assignor to another who, by acceptance, promises to perform those duties, and this promise is enforceable by either the assignor or the other party to the original agreement. *Pemberton v. Arkansas State Highway Commission*, 268 Ark. 929, 597 S.W.2d 605 (Ark. App. 1980). Since an assignment is a contract, it is subject to the same requisites as to validity as other contracts, such as proper parties, mutual consent, consideration and legal subject matter. *See, Turner v. Rust*, 228 Ark. 528, 309 S.W.2d 731 (1958).

The chancellor found that there was no evidence of intent to assent to the management agreement. She specifically found that the existence of the management agreement and its terms were not disclosed to appellees at the time that they acquired their interests, and that it was not until after a decision was made to sell the property that they were informed of appellants' claim. Although we review chancery cases *de novo* on the record, we do not reverse the findings of a chancellor unless they are clearly against the preponderance of the evidence, giving due deference to the chancellor's superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Walker v. Hubbard*, 31 Ark. App. 43, ___ S.W.2d ___ (1990). From our review of the record, we cannot conclude that the findings outlined above are clearly erroneous.

Although the chancellor found that the Joint Venture was not bound by the management agreement, she "reluctantly" found that Chowning, Friday, and Hawthorne Land Company were liable to Management for the termination of the agreement based on a theory of ratification. She based the ratification by Chowning upon

his involvement in several capacities with both RPM and Management. She found that Friday and Hawthorne were bound by the agreement because of their response to a letter requesting that they ratify the management agreement. On cross-appeal, appellees contend that the chancellor erred in finding Chowning, Friday, and Hawthorne Land Company liable on the agreement on the basis that they were misled regarding an essential term of the agreement and that therefore they could not have effectively ratified it. We agree.

The chancellor specifically found that appellees were never advised by appellants that they had considered the management agreement to have been in force beyond the sale of the property, and "[a]ccordingly, the Court finds that the attempt to enforce the Management Agreement for the full ten-year period beyond the date of termination constitutes 'unfair surprise' upon those plaintiffs herein held liable."

To hold that appellees ratified the ageement, the chancellor had to find that they were aware of the material facts. Although the agreement specifies a twenty-five-year term, the agreement is silent as to its effect upon the sale of the property. We have been unable to find any evidence to suggest that appellees were made aware that appellants intended to enforce the agreement after the sale of the property, although when the parties purchased their interests it was clearly contemplated that the property would be sold prior to the twenty-five-year termination date. The chancellor found that there was no evidence of intent to assent to the management agreement being extended beyond the period that the property was owned by its present owners. The chancellors specifically found that Billy Rector had represented that the management contract would terminate on the sale of the property.

While one may bind himself to existing contracts by adoption and ratification, the validity of the adoption must

be determined in accordance with the rules of law applicable to contracts in general. *See* 6A C.J.S. *Assignments* §57 (1975); *Turner v. Rust, supra; Local Union No. 529, United Brotherhood of Carpenters and Joiners of America v. Bracy Development Co.*, 321 F.Supp. 869 (W.D. Ark. 1971). Where there has been an unintentional deception yielding a manifestly unjust result, the court of equity may remedy the constructive fraud. *Cuzick v. Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985). Here, the chancellor found that relief from the contract was warranted because of the misrepresentations by Billy Rector, but allowed appellees Chowning, Friday and Hawthorne Land Company only partial relief. Based on the chancellor's finding of deception, we conclude that the chancellor erred in finding that appellees Chowning, Friday, and Hawthorne Land Company were liable for the termination of the agreement based on a theory of ratification.

Appellants contend that the chancellor erred in permitting appellees to testify as to statements made to them by Billy Rector on the basis of the parol evidence rule. They argue that any statements made by Rector prior to appellees' purchase of their interests in the property were merged into the written contract agreement and, therefore, parol evidence was inadmissible to vary its terms. *See Coulson Oil Co. v. Wilcox*, 12 Ark. App. 111, 671 S.W.2d 198 (1984). We disagree.

The parol evidence rule requires exclusion of evidence of prior or contemporaneous agreements of the parties which vary the express terms of their written agreement. *Sterling v. Landis*, 9 Ark. App. 290, 658 S.W.2d 429 (1983). However, this rule does not apply where oral evidence pertains to a collateral fact about which the written agreement is silent. *Prudential Insurance Co. of America v. Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985). Here, the management agreement was silent regarding what would take place beyond a sale, and the joint venture agreement was silent regarding the management agreement. Nor was

there a writing evidencing the terms and conditions on which any assumption of the management agreement was based. As these agreements were totally silent as to these issues, parol evidence was admissible to explain the true intention of the parties.

Appellants further attempt to obligate appellees under the management agreement by contending that, as members of a joint venture, appellees are liable on a contract entered into on behalf of the venture. *See Myers v. Lillard*, 215 Ark. 355, 220 S.W.2d 608 (1949). Appellants' argument, however, ignores the fact that the management agreement was entered into by RPM when it was the sole owner of the property, and there is no evidence that it was entered into for the benefit of the Joint Venture, which had not yet been formed.

Appellants also contend that Chowning's knowledge of the management agreement should be imputed to the other members of the Joint Venture. We disagree. As previously discussed, although Chowning did have knowledge of the agreement, he had been misled as to the critical provision upon which the agreement was silent.

Nor can we agree that because appellees accepted management services for fifteen years without protest they are estopped from arguing that they were not bound by the agreement. As an element of estoppel, the party to be estopped must know the facts. *Askew Trust v. Hopkins*, 9 Ark. App. 19, 688 S.W.2d 316 (1985). Here, the chancellor specifically found that the existence of the management agreement was not disclosed to appellees at the time that their interests were acquired and that they were never advised that appellants' position with regard to the survival of the management agreement was different from that represented to them by Billy Rector.

Appellants also contend that the chancellor erred in finding that the Rector family was not liable on the contract

because of a release executed by RPM. The release was part of a settlement agreement entered into by RPM and the Rector family in another matter. Appellants argue that this release did not pertain to the Rectors' liability under the management agreement because, when the settlement agreement was executed, the management agreement had not been terminated and, therefore, no cause of action existed against the Rectors. RPM, however, became aware that there was a problem with the terms of the management agreement in 1984, and the release was executed in 1986. More importantly, the chancellor found that the Joint Venture did not assume RPM's obligation under the management agreement; accordingly, the Rector family did not become liable under the management agreement because it was assigned RPM's interest in the Joint Venture.

RPM acted as agent in the sale of the mall property by the appellees in 1986. On cross-appeal, appellees contend that the chancellor erred in not ordering that the broker's commission, which was paid as a result of the sale, be refunded because RPM breached its fiduciary duty as real estate agent in that transaction. They argue that RPM negotiated on behalf of appellees to sell the mall while simultaneously asserting the validity of the management agreement, which hindered the sale and would have prevented it had they not entered into the escrow agreement. They rely on *Toney v. Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983), for the rule that a broker cannot be permitted to take advantage of a position to make a gain for himself by undermining his principal.

In *Toney*, however, the broker entered into a secret agreement with the seller which was not disclosed to his buyer, thereby realizing a secret profit in addition to his broker's commission. Here, appellees were advised of appellants' position regarding the management agreement in 1984, yet they continued to employ RPM as their broker

until the property's ultimate sale in December 1986. We therefore find no error in the chancellor's refusal to order a return of the commission.

That part of the order exempting Judith Burrow, Executrix of the Estate of Lawrence A. Burrow, deceased, Wilbur P. Gulley, Jr., Mary E. Gulley, Janet Gulley Wade, the Eleanor Rector Trust, and the Rector family from liability under the management agreement is affirmed. That part of the order holding Robert Chowning, Herschel H. Friday, and the Hawthorne Land Company liable on the management contract is reversed and the order is modified to that extent.

Corbin, C.J., and Cooper, Jr., agree.

Order of the Chancery Court of Pulaski County, Arkansas of December 22, 1988

Robert CHOWNING, *et al.*, Plaintiffs

RPM Management Company, Inc., *et al.*, Defendants
No. 87-931

JUDITH ROGERS, Chancellor

On the 27th, 28th and 29th days of September and the 8th day of November, 1988, this cause came on to be heard before the Honorable Judith Rogers, Chancellor. The plaintiffs appearing in person and through their attorneys, Friday, Eldredge & Clark, by Michael G. Thompson and Meredith P. Catlett, and defendants appearing in person by their various corporate representatives and through their attorneys, The Gill Law Firm, by John P. Gill and W. W. "Dub" Elrod. Based on the pleadings, testimony and both pre-trial and post-trial briefs submitted by the parties, the Court, being well and sufficiently advised as to all matters of fact and law, finds and orders:

1. On January 11, 1972, Rector-Phillips-Morse, Inc. (RPM), as sole owner of certain real property located in Pulaski County, Arkansas, commonly known as Southwest City Mall (the Property), entered into a Management Agreement with Anything, Inc., the predecessor in interest to RPM Management Company, Inc. (Management). Both Anything, Inc. and Management were and are wholly owned subsidiaries to RPM. The Management Agreement provided that RPM would employ Management exclusively to rent, lease, operate and manage the Property for a twenty-five (25) year term beginning on January 6, 1972 and ending on January 5, 1997. The Management Agreement is silent as to its effect beyond the sale of the Property. There was testimony, and the Court adopts as a finding, that representations were made by Billy Rector that the Management Agreement would terminate upon the sale of the Property, and further, that when the plaintiffs purchased their interests in the Property, the parties contemplated holding their interests for only a ten year period because of the structure of the tax laws at that time.

2. RPM conveyed to each Robert Chowning and Larry Burrow a 19.3% interest in the Property by Warranty Deeds on September 26, 1972. That same day, RPM, Chowning and Burrow entered into a joint venture agreement in the name of the Southwest City Joint Venture. Title to the Property was vested in RPM as Trustee for the benefit of the Joint Venture. By subsequent mutual agreement, Chowning and Burrow each acquired an additional .7% interest in the Property, raising their respective total interests to 20%.

3. By amendment to the Joint Venture Agreement dated July 23, 1973, the JaJa Gulley Trust and Mary Elizabeth Gulley each acquired a 5% interest in the Property. Upon the death of JaJa Ashburn Gulley on June 17, 1978, the 5% interest of the JaJa Gulley Trust passed one-half to Janet Gulley Wade, and one-half to W. P. Gulley, Jr.

4. By warranty deed dated July 27, 1973, RPM conveyed a 20% interest in the Property to Herschel H. Friday.

5. On September 1, 1973, Hawthorne Land Company acquired a 10% interest in the Property as part of a tax free exchange wherein RPM conveyed the interest in the Property by warranty deed to C. V. Barnes, and C. V. Barnes, as agent, conveyed the interest in the Property by warranty deed to Hawthorne Land Company.

6. On July 30, 1975, Eleanor T. Trotter acquired a 5% interest in the Property as part of a tax free exchange, wherein RPM conveyed the interest in the Property to Terry Wood, Inc., as agent, who in turn conveyed the interest to Eleanor T. Trotter by warranty deed.

7. By assignment, dated August 31, 1976, the Eleanor Rector Trust acquired a 5% interest in the Joint Venture.

8. Burrow died on October 22, 1985, and Judith D. Burrow was appointed Executrix of his estate. Notice to creditors was first published on November 10, 1985. No claim was filed by either RPM or Management against Burrow's estate.

9. By assignment, dated August 22, 1986, RPM assigned its remaining 10% interest in the Joint Venture to William F. Rector, Jr., Eleanor Trotter, Ann Lewis, Nancy Rector Young, and the W. F. Rector Family Trust, collectively known as the "Rector Family". This exchange was made pursuant to the Settlement Agreement entered into by RPM with the Rector Family in the case of William F. Rector, Jr., et al. v. Rector-Phillips-Morse, Inc., et al., Pulaski Chancery No. 85-4497. Pursuant to the Settlement Agreement, RPM executed a Release whereby RPM agreed to release the Rector Family from any and all claims, demands, damages, actions, causes of action, suits of any kind or nature whatsoever, known or through the exercise

of reasonable diligence should have known as of August 12, 1986.

10. In 1984, the Owners made the decision to sell the Property. RPM was hired as a co-listing agent to seek out a buyer for the Property. When the Property was first listed for sale, the survivability of the Management Agreement was not mentioned. It was not until after the first offer to purchase the Property was made that the defendants advised the plaintiffs that the Management Agreement would remain effective beyond the sale of the property.

11. On December 31, 1986, the Owners, which at that time did not include RPM, conveyed all their right, title and interest in the Property to 1986 Southwest City Mall Joint Venture and American Store Properties, Inc.

12. The parties executed an Escrow Agreement, dated December 23, 1986, whereby Flake & Company assumed responsibility for the management of the Property, which effectively terminated the Management Agreement. In executing the Escrow Agreement, the parties did not waive any right or claims under the Management Agreement. The plaintiffs, while denying any liability to RPM or Management under the Management Agreement or otherwise, obtained and delivered to First Commercial Bank, N.A. an irrevocable letter of credit in the amount of $400,000.00 to provide security for the claims of the defendants and to provide a fund for the payment of claims established in this litigation.

13. The primary dispute in this litigation concerns the enforceability of the Management Agreement against the plaintiffs beyond the sale of the Property for the remaining ten year term until 1997. The defendants seek to bind the plaintiffs, Judith D. Burrow, Executrix of the Estate of Lawrence B. Burrow, Deceased, Wilbur P. Gulley, Jr., Mary E. Gulley, and Janet Gulley Wade, inasmuch as they derived their interests in the Property from the Joint

Venture, by contending that the pre-existing Management Agreement became a partnership obligation of the Joint Venture, which they assumed upon acquiring their interests in the Property.

14. Despite this assertion, the Court does not accept this argument for two reasons. The existence of the Management Agreement and its terms was not disclosed to these plaintiffs at the time their interests were acquired. It was not until after the decision was made to sell the Property, and when the first offer for its purchase was made, that the defendants informed the plaintiffs of their position that the Management Agreement would remain effective upon the sale of the Property. Such a position constitutes an undisclosed risk as to its detrimental effect upon the value of their interests. The Court does not find any evidence of the intent to assent to the Management Agreement's extending beyond a sale of the Property. The testimony revealed that representations were made by Billy Rector that the sale of the Property was contemplated in ten years because of the existing tax laws.

15. Secondly, the defendants cite ample authority to bind those members of the Joint Venture as being liable as partners for all obligations of the partnership before their admission as though they had been partners when the obligations were incurred. However, there is no evidence that the Management Agreement ever became an obligation of the Joint Venture.

16. The Management Agreement was entered into between RPM and its wholly owned subsidiary at a time when RPM was the sole owner of the Property. RPM then conveyed interests in the Property by warranty deeds to Robert Chowning and Larry Burrow, who, together with RPM, established the Joint Venture. The court finds no evidence that the Management Agreement was ever assigned to the Joint Venture, or that the Joint Venture itself assumed or adopted the Management Agreement. The

mere formation of the Joint Venture, without more, does not render it liable pursuant to a pre-existing contract as entered into and on behalf of RPM and Management. Thus the defendants fail in attempting to hold these plaintiffs liable by virtue of their being members of the Joint Venture without first linking the Management Agreement to the Joint Venture.

17. At trial, Robert Beal, the President of Management, candidly testified that the Management Agreement was entered into for the purpose of attempting to obligate the Property for many years after it had been fully sold by RPM. This fact was not disclosed to the purchasers who are the plaintiffs in this case. As the real estate agent, RPM had a fiduciary duty to disclose this position. While Robert Chowning may not have known of the existence of the Management Agreement or its enforceability at the outset, because of his intimate involvement in both RPM and Management as an officer, director and in-house counsel, he either ratified the Agreement or as an attorney and owner he should have repudiated it upon learning of its binding effect. Furthermore, Chowning specifically requested of Friday and Hawthorne Land Company that they acknowledge and ratify the Management Agreement. Because of his position within both companies, as well as his actions, the Court cannot exculpate Chowning and holds him liable to the extent of his interest in the Property.

18. In regards to Friday and Hawthorne Land Company, the Court will reluctantly enforce the Agreement against these plaintiffs to the extent of their respective interests. But for their specific ratification of the Management Agreement, despite its onerous provisions, as evidenced by their respective letters dated October 26, 1988, the Court would not do so. However, these plaintiffs do not occupy the same uninformed position of the other plaintiffs as they had been provided a copy of the Management Agreement. In addition, the Court would

place a duty to inquire upon Friday and Hawthorne Land Company to ascertain the extent of their obligations under an Agreement that they were specifically requested to ratify. *Berkeley Pump v. Reed-Joseph Land Company, et al.*, 279 Ark. 384, 397, 653 S.W.2d 128 (1983). Also see, *Affiliated Laundreis, Ltd. v. Keeton*, 270 Ark. 841, 606 S.W.2d 370 (1980). The Court is not unmindful that Chowning may have had a more specific duty to inform these plaintiffs that the Management Agreement was considered binding in the event of a sale of the Property, since Chowning requested them to ratify the Agreement. Another Court could perhaps find, since Chowning was an officer of RPM, that this failure to disclose would relieve Friday and the Hawthorne Land Company of liability.

19. While the Court finds that the Management Agreement is enforceable as against Chowning, Friday and the Hawthorne Land Company, the Court is troubled and reluctant to do so for the full twenty-five year term. The Court's reluctance stems from the facts concerning the relationship between RPM and Management, and the Agreement as made between them. For the following reasons, the Court concludes that the provision with respect to its duration until 1997 is unconscionable and commercially unreasonable.

20. The Management Agreement was entered into between RPM and Anything, Inc., the predecessor in interest to Management, both of which were and are wholly owned subsidiaries of RPM. RPM and Management share interlocking directors; they operate out of the same facilities; make use of some of the same employees; and interchange funds. The employees designated as Management employees are actually paid by RPM. The circumstances surrounding these entities and the execution of the Agreement suggest, and the Court finds, that the provision was intended as a self-serving attempt to lock in Management's services, and was totally unrelated to

the risks and needs of the business. The commercial needs of the situation did not call for a clause of this duration as subsequent conveyances were anticipated by RPM.

21. Robert Swango testified that most shopping center management contracts with which he was familiar were for periods of from one to three years. In Swango's professional opinion, a term of twenty-five years for a shopping center management contract was commercially unreasonable. The Court agrees. Under all the facts and circumstances in this case, the Court is of the opinion that Management is only entitled to enforce the contract for a period of five years from the date of termination, or until the end of 1991.

22. To the extent that some of the plaintiffs are herein found liable for termination of the Management Agreement, the Court finds that, upon those plaintiffs' adoption of ratification of the Management Agreement, they were not advised by the defendants that they considered the Management Agreement to be enforceable beyond the sale of the Property. Accordingly, the Court finds that the attempt to enforce the Management Agreement for the full ten year period beyond the date of termination constitutes "unfair surprise" upon those plaintiffs herein held liable, which renders the enforceability of the contract for the full remaining term unconscionable.

23. In addition to the foregoing, the testimony established that any damages sustained by Management as a result of the termination of the Management Agreement will be fully mitigated within five years of the date of termination. According to the testimony of Gaines Norton, Management had already partially mitigated the loss of the contract by acquiring other management contracts, such as the Lafayette Building and in excess of twenty other management contracts. Norton also testified that Management had shown, by its past financial history, that it

has the ability to mitigate income losses by appropriately adjusting expenses and by increasing overall revenues. Therefore, even if the Management Agreement were otherwise enforceable for the full ten year period beyond the date of termination, the Court finds that, under the evidence produced at trial, no damages will be suffered by Management during the last five years of the contract. Accordingly, in addition to the Court's finding that the term of the Management Agreement is unconscionable beyond five years from the date of termination, the Court also finds that due to mitigation, no damages will be suffered by Management during the last five years of the Agreement. A contrary finding would be entirely speculative and would constitute a windfall to Management.

24. Finally, with respect to this issue, the equities of this case will not allow any recovery beyond five years from the date of termination. The Management Agreement was not entered into at arms length and was not negotiated by those plaintiffs herein found liable. RPM's conduct in selling interests in the Property to the various plaintiffs without disclosing to them at the time of sale the existence of the Management Agreement constitutes undue overreaching and a breach of fiduciary duty, which would make it inequitable to enforce the Agreement, even if the Court felt that damages would otherwise be suffered during the last five years of the contract. In reforming the Agreement to limit its enforceability to five years from the date of termination, the Court is relying on its equitable power to reform contract provisions when it appears that enforcement would otherwise create an undue hardship or injustice not contemplated by the parties. Based on the foregoing findings in regards to unconscionability and commercial reasonableness, the Court believes that extending the term of the contract for five years from the date of termination is reasonable and warranted under the circumstances.

25. Lost profits may be the basis of an award of damages. A claim for lost profits must be established with reasonable certainty, and the complaining party must produce a reasonably complete set of figures upon which the trier of fact can base its award, and not engage in impermissible speculation and conjecture. In computing lost profits, the general rule is that the cost of performing the contract is subtracted from the gross proceeds to reach the net profit. *Robertson v. Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973).

26. According to the terms of the Management Agreement, the management fee was to be 6% of the gross receipts. However, it is undisputed that only 5% was charged by Management in calculating its fee. Thus, the Court will reform the Agreement to reflect the intention and conform to the actual conduct of the parties. *Wallace v. U.S.*, 294 F.Supp. 1225 (E.D. Ark. 1968).

27. The Court was presented with a wide range of expert testimony from both sides. However, the Court found the testimony of Loyd Walker to be the most reasonable and credible, and will accept his figures in determining the amount of lost profits. Thus the Court finds with reasonable certainty that the defendants would have suffered lost profits as a result of the termination of the Management Agreement, at least during the first five years of the remaining ten year term of the Management Agreement.

28. Using historical data of the management fees, calculated at 5% of the gross receipts collected, and earned from the years 1979 through 1986, Mr. Walker determined that the average annual percentage increase in management fees earned was 4.41%. Walker also arrived at an expense factor of 15.4%. By applying the average annual percentage increase in the management fees earned and then applying the expense factor of 15.4%, Walker

calculated the net management fees that would have been earned for each year. Thus using Walker's calculations, the net fees that would have been earned from 1987 through 1991 is $208,361.00.

29. The Court will, however, deviate from Walker's projections, and will apply the discount rates submitted by Dr. Rawleigh Rawls upon the request of the Court. Since the Court is limiting liability to the first five years post termination, the years 1987 and 1988 will not be discounted as already earned. Applying the discount rates for the years 1989, 1990 and 1991 at 8.38%, 8.51% and 8.55% respectively, the net management fee mentioned above will be reduced by $11,058.38.

30. The Court has not adjusted the gross profits for salaries to the extent that they can be considered a fixed overhead expense that would have remained constant. However, a party claiming damages has the legal duty to mitigate those damages. The plaintiffs, in defense of the defendants's claim for damages, contended that mitigation had already occurred to the extent that Ross McCain, the officer of Management who was principally in charge of performing the Management Agreement, retired in June of 1987, approximately six months after the contract was terminated. Ron Goss was hired by Management to assume the duties of Ross McCain. Gaines Norton testified that the difference in the salary and entitlements paid by Management to McCain and Goss saved the company $26,000.00 per year. The Court adopts Norton's testimony regarding this issue. As a result of the aforementioned decrease in expenditures, Management has partially mitigated any lost profits suffered by it at least by an amount equal to the difference in compensation paid to McCain before his retirement and to Goss thereafter. The savings to Management of this expense must be deducted from the amount of its lost profits under the doctrine of mitigation of damages.

31. Other evidence of mitigation was presented by plaintiffs principally through the testimony of Gaines Norton, with regard to the acquisition of new substitute business subsequent to the termination of the Management Agreement. According to Norton, Management increased its gross management revenues by $33,000.00 subsequent to the termination of the Management Agreement, $14,000.00 of which was attributable to the Lafayette Building and the balance of which was attributable to over twenty other new management contracts. While the Court finds that, in addition to the mitigation experienced by the salary differential between McCain and Goss, other mitigation was occurred and is occurring. The effect of such mitigation is dealt with in this Court's finding that no damages will be suffered by Management during the last five years of the Management Agreement. Accordingly the Court finds that the damages suffered by Management for the years 1987 through 1991 must be reduced by $26,000.00 per year for four and one-half years beginning in July of 1987, for a total of $117,000.00.

32. The Court finds that the Release of the Rector Family executed as part of the Settlement Agreement should operate to reduce the sums owed under the Management Agreement by 20%, or the extent of their interest. The Rector Family is exonerated by the Release, and their financial stake was knowingly assumed by RPM, thus RPM may not transfer this liability to the remaining owners.

33. In sum, the lost profits that would be sustained by the defendants upon termination of the Management Agreement for the first five years of the remaining term of the contract is $80,302.62. This amount, having been reached after reducing the total net management fees to present value for the years 1989 through 1991 and after deducting the mitigated damages associated with the savings attributable to the retirement of Ross McCain, is to be apportioned among plaintiffs Chowning (20%), Friday

(20%) and the Hawthorne Land Company (10%), to the extent of their respective interests.

34. The plaintiffs have contended that any claim defendants may have had against Judith E. Burrow, Executrix of the Estate of Lawrence B. Burrow are barred by the Statute of Nonclaim, as found in *Ark. Code Ann.* Section 28-50-101 *et seq.* The Court is not persuaded that this was a contingent claim as the Management Agreement was extant, and had not been breached or terminated during the claims period.

35. Defendants also seek to recover a leasing commission allegedly earned by virtue of Merrill Porter, an employee of RPM's, solicitation of a ground lease for the installment of Bojangles Fried Chicken Restaurant. There is no written contract concerning the payment of this leasing commission. In defense of the lengthy, twenty-five year term of the Management Agreement in question, defendants claimed at trial that the long-term Management Agreement with its resulting management fees was a means of recouping leasing fees. In other words, they argued that the management fee included their compensation for leasing as well as leasing renewals. Their request for an additional fee is inconsistent with this justification, and is based on the unlikely distinction between "in" and "out" parcel leasing. This is an attempt to have it both ways, thus the Court rejects this argument and demand. Further, Porter testified that leasing commissions are earned when the lease is signed, which was in 1983. *Ark. Code Ann.* Section 16-56-105 provides that actions founded on unwritten contracts must be brought within three years after the cause of action accrued. Consequently it seems that this claim may be barred by the Statute of Limitations as well.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that based on the foregoing findings of

fact and conclusions of law, plaintiffs Judith D. Burrow, Executrix of the Estate of Lawrence B. Burrow, Deceased, Wilbur P. Gulley, Jr., Mary E. Gulley and Janet Gulley Wade are hereby excepted from liability in regards to the Management Agreement; that plaintiffs Robert Chowning, Herschel H. Friday and the Hawthorne Land Company are subject to liability under the terms of the Management Agreement, which is hereby reformed to reflect a 5% management fee of the gross receipts; that the total lost profits, which is hereby limited to the first five years of the remaining ten year term, to be suffered by the defendants is $80,302.62, however this amount shall be reduced by 20%, the extent of the interest of the Rector Family, which together with the interests of the plaintiffs herein not found to be liable for the termination of the Management Agreement, reduces the total contract liability by 50%; said plaintiffs, Robert Chowning (20%), Herschel H. Friday (20%) and the Hawthorne Land Company's (10%), liability is hereby limited to the extent of their respective interests in the Property, which said percentages are to be taken from the full amount of the lost profits, or $80,302.62; defendants are thereby granted judgment in the amount of $40,151.31, which is to be apportioned among the plaintiffs herein found to be liable, and for which execution or garnishment may issue as upon a judgment at law; said judgment shall be satisfied in accordance with the terms and provisions of the Escrow Agreement previously entered into between the parties, and out of the funds so designated and held by First Commercial Bank, N.A.; that the present claim by the defendants was not a contingent claim barred by the Statute of Non-Claims; and that the leasing commission requested by the defendants is hereby denied.

IT IS SO ORDERED.

Order of the Supreme Court of the State of Arkansas
of September 10, 1990

RPM Management Company, Inc. *et al.*, Appellants
v.
Robert CHOWNING, *et al.*, Appellees
No. 90-187

LESLIE W. STEEN, Clerk

Petition for Review is denied. Dudley, Hays, and Turner, JJ., not participating.

Order of the Arkansas Court of Appeals
of August 22, 1990

RPM Management Company, Inc. *et al.*, Appellants
v.
Robert CHOWNING, *et al.*, Appellees
No. CA 89-168

LESLIE W. STEEN, Clerk

Petition for Rehearing is denied. Jennings and Rogers, JJ., not participating.